

**STATE BOARD OF EQUALIZATION**

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December 31, 1991

Mrs. J---- R. C---,  
C.A. D.O.M.  
XXXX --- ---  
---, CA XXXXX

RE: SR -- XX-XXXXXX

Dear Mrs. C---:

The Legal Division has tasked me to respond to your letter to it of November 18, 1991. You have some questions regarding application of sales and use tax to your sales of herbs and supplements.

I. FACTUAL BACKGROUND

You recite the facts of this case as follows:

“I am a Licensed Acupuncturist in the state of California with a Doctorate in Oriental Medicine. I am considered a primary health care practitioner in the state of California. I dispense herbs and supplements to my patients. Doesn’t this status exempt me from paying state, local and district sales tax on my herbs and supplements? Items I dispense are not available in stores.”

II. OPINION

In California, except where specifically exempted by statute, Revenue and Taxation Code Section 6051 imposes an excise tax, computed as a percentage of gross receipts, upon all retailers for the privilege of selling tangible personal property at retail in this state. (Unless otherwise stated, all statutory references are to the Revenue and Taxation Code.) “[I]t shall be presumed that all gross receipts are subject to tax until the contrary is established. The burden of proving that a sale of tangible personal property is not a sale at retail is upon the person who makes the sale...” (§ 6091.) “Exemptions from taxation must be found in the statute.”

(Market St. Ry. Co. v. Cal. St. Bd. of Equal. (1953) 137 Cal.Ap.2d 87, 96 (290 P.2d 201.) “The taxpayer has the burden of showing that he clearly comes within the exemption.” Standard Oil Co. v. State Bd. of Equalization (1974) 39 Cal.App.3d 765, 769 [114 Cal.Rprt. 571].)

Exceptions to the general rule which may apply to your circumstances are contained in Section 6359 (the food product exemption) or Section 6369 (the prescription medicine exemption). The applicable regulatory provisions which interpret and implement these statutes are, respectively, Regulation 1602 and Regulation 1591.

Regarding the food products exemption, generally, if the product is in liquid, powdered, granular, tablet, capsule, lozenge or pill form which is described on its package or label as a food supplement or dietary adjunct sales of the product are taxable. (18 Cal. Code Regs., Reg. 1602(a)(5)). Additionally, we have viewed sales of herbs to be taxable if medicinal qualities are claimed for them while sales of herbs sold solely for seasoning are exempt. (II Bus. Tax. L. Guide, Annot. 245.0500).

The prescription medicine exemption provides in pertinent part:

“There are exempted from the taxes imposed by this part the gross receipts from the sale, and the storage, use, or other consumption, in this state of medicines:

(1) Prescribed for the treatment of a human being by a person authorized to prescribe the medicines, and dispensed on prescription filled by a registered pharmacist in accordance with law, ....” (Rev. & Tax. Code § 6369(a)(1)).”

Business and Professions Code Section 4036 pertains to “prescriptions” and provides in pertinent part:

“(a) ‘Prescription’ means an oral order given individually for the person or persons for whom prescribed, directly from the prescriber to the furnisher, or indirectly by means of a written order, signed by the prescriber,.... No person other than a physician, dentist, podiatrist, or veterinarian, shall prescribe or write a prescription....”

We recognize that the Business and Professions Code provides for licensing of acupuncturists (§ 4925 et seq.) and also authorizes them to “prescribe herbs as dietary supplements” (§ 4937). However, it is our opinion tht the Legislature, in adopting the language in Section 6369(a)(1) of the Revenue and Taxation Code, chose to adopt the limiting definition of “prescription” found in Section 4036 rather than the broader interpretation implicit in Section 4937. Indeed, when Section 6369 was adopted in 1961, Section 4036 was in existence while Section 4937 was not. Thus, we construe Section 6369(a)(1)’s reference to “...person authorized to prescribe the medicine ...” to mean that person must be a physician, dentist, or podiatrist.

Unless an acupuncturist is also licensed as one of these entities, his prescriptions are not exempted from sales and use tax as being within the prescription medicine exemption. Additionally, the prescription must be filled by "... a registered pharmacist in accordance with law...." (§ 6369(a)(1)). Registration requirements for pharmacists are found in Business and Professions Code Section 4050 et seq.

Based on the foregoing discussion, it is our conclusion that your herb sales do not qualify under the food product exemption because the sales are made for medicinal purposes. Additionally, assuming that you are not also a physician, dentist, or podiatrist and are not registered as a pharmacist in accordance with the above cited sections of the Business and Professions Code, the sales in question would not qualify as exempt sales of prescription medicines.

We hope this has answered your questions. If it has not or if further assistance is required, feel free to contact us again. For your information, I have enclosed copies of Sales and Use Tax Regulations 1591 and 1602.

Sincerely,

John L. Waid  
Tax Counsel

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Encs.: Regs. 1591 & 1602